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No. 845

In the Supreme Court of the United States

OCTOBER TERM, 1957

WEYERHAEUSER STEAMSHIP COMPANY,
a corporation,
Petitioner,

vs.

HAROLD YANOW,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The original opinion of the United States Court of Appeals for the Ninth Circuit is reported at 250 F. 2d 74. The amended opinion dated February 21, 1958, is not reported at this time but is printed in Petitioner's Appendix A, pp. 13-19. There was no opinion rendered by the District Court.

JURISDICTION

The judgment of the Court of Appeals was entered on February 21, 1958, and the Petition for a Writ of

Certiorari was served upon respondent on March 8, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

In view of the length and lack of clarity of the Petition for a Writ of Certiorari it is difficult for respondent to determine the exact questions sought to be reviewed. However, after careful study of the Petition it would appear that the following questions concern Petitioner:

1. Whether the decision of the Court of Appeals in this case is in conflict with the decisions of other Courts of Appeals, particularly those of the Third Circuit in that the Court of Appeals herein refused to apply the Third Circuit's doctrine of "transitory unseaworthiness" as expressed in *Cookingham v. U. S.*, 184 F. 2d 213, cert. den., 304 U.S. 935.

2. Whether the Court of Appeals erroneously construed this Court's opinion in the *"The Osceola,"* 189 U.S. 158, and whether similar constructions of said case by this Court and all inferior Courts since 1903 have been erroneous and in violation of the United States Constitution which provides for separation of powers between the legislative and judicial branches of the federal government.

3. Whether the Court of Appeals erred in reversing the District Court's judgment on the ground that the District Court improperly instructed the jury as to the law of unseaworthiness.

STATEMENT

Petitioner seeks review of the judgment of the Court of Appeals for the Ninth Circuit reversing the judgment of the United States District Court for the District of Oregon, which was based upon a jury verdict for the petitioner.

The evidence shows that respondent Yanow was working as a longshoreman at Coos Bay, Oregon, on August 1, 1954, aboard petitioner's vessel the W. H. PEABODY, a 10,000 ton Liberty Ship (R. 26, 31). The gang he was working with was engaged in stowing the deck load of lumber at No. 2 hatch. This involved moving loads of lumber on rollers into position where the men were working to build up the level of the "floor" (R. 32-35). A load of lumber had just been landed and respondent needed a peavey to facilitate his work. He went to get one behind the No. 2 port winch and there is strong testimony that as he walked by the winch he slipped on the "blob of grease" (R. 35, 36) and fell, striking his back on part of the winch on the way down (R. 36).

As a result of this fall, there is evidence that the respondent aggravated a previous back condition and sustained a bruised back, a bumped head, and had the wind knocked out of him (R. 40).

There was no direct proof of how the grease got on the deck near the winch, but it might be inferred from the evidence that it came from lubrication of the winch or from a coiled wire fall which was on the deck between

the winch and the deckhouse (R. 37, 38, 57, 69, 70, 115, 135, 160-1).

Respondent based his action for damages on two claims: (1) That petitioner was negligent in allowing grease or oil to accumulate on the deck of the W. H. PEABODY, and in failing to cover it with sand or sawdust, to provide respondent with a safe place to work, to inspect, and to warn respondent; and (2) in that the vessel was unseaworthy (R. 5).

The jury returned a verdict for the petitioner and respondent appealed to the Court of Appeals on the ground that the Court had erroneously instructed the jury in two respects:

1. By giving an instruction to the effect that if the injuries to respondent resulted from an unavoidable accident, "accidents which happen without the fault of anyone," then the jury must find for the petitioner.

Respondent contended that such instruction was broad enough to cover his cause of action based upon the alleged unseaworthiness of the W. H. PEABODY, as well as his cause of action based upon the ship's negligence. The Court of Appeals agreed with respondent and reversed.

2. By leaving to the jury the question of whether there was sufficient oil or grease collected on the deck where respondent fell as to render the ship unseaworthy. The Court of Appeals held that this instruction was proper.

ARGUMENT

1. Respondent believes that the Petition for a Writ of Certiorari does not comply with this Court's rules in that it is not clear and concise and the issues raised are not clearly set forth. The Petition for a Writ of Certiorari should be denied for this reason. Rule 23 (4).

2. The record fails to show that petitioner requested any instructions at the trial of this case embodying the doctrine of "transitory unseaworthiness" as formulated by the Third Circuit in the *Cookingham* case. No exceptions appear in the record to the alleged refusal of the trial Court to give such instructions. No issue of this sort was raised by petitioner in the trial Court in any way. The validity or the application of the *Cookingham* rule was not in issue in the Court of Appeals nor did the Court of Appeals discuss it in its opinion. At no point in the proceedings below was the doctrine of "transitory unseaworthiness" litigated or decided and respondent therefore suggests that the issue is not ripe for decision by this Court in this case. *Walters v. The City of St. Louis, Mo.*, 347 U.S. 231 (1954).

3. The liability of a ship for injuries caused by unseaworthiness which was announced by this Court in *The Osceola* in 1903 was not challenged by petitioner either in the trial Court or in the Court of Appeals. However, petitioner would have this court on such a record overrule 55 years of maritime law based upon *The Osceola* decision. It would have this Court reverse its humane approach towards the administration of maritime law and revoke from seamen their remedy for

personal injuries resulting from the unseaworthiness of a vessel.

Apparently petitioner also contends that the decision in *The Osceola* was an unconstitutional assumption of legislative power by this Court. It will be noted, however, that these constitutional issues were not raised below or decided by the Court of Appeals. Respondent suggests that petitioner is attempting to raise this issue far too late in this proceeding.

4. If respondent had a right to claim damages resulting from the unseaworthiness of petitioner's vessel, he obviously had a right to a jury trial based upon an accurate instruction by the Court as to the law of unseaworthiness. For this reason, the Court of Appeals quite properly reversed the judgment where prejudicial error was made by the Trial Court in its instruction on this issue.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

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NELS PETERSON, and
GERALD H. ROBINSON,
Of Counsel for Respondent.